A

KOLONEL DR FAIZ AZRAAI ABDUL AZIZ v. MAHKAMAH TENTERA DIVISYEN KEEMPAT INFANTRI MALAYSIA

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
MOHAMAD ZABIDIN MOHD DIAH FCJ
B MARY LIM FCJ
[CIVIL APPEAL NO: 01(f)-5-02-2022(W)]
16 MAY 2023

C **Abstract** – *While matters of military discipline are best or better left to be decided by the military legal system, the courts do have jurisdiction to intervene when approached on a matter of substantive law, more so, when it involves matters of fundamental rights of a military personnel, such as right to livelihood, as enshrined under the Federal Constitution.*

D ***ADMINISTRATIVE LAW:*** *Judicial review – Decision of court-martial – Appeal against – Army officer guilty of offence of desertion under s. 54(1)(a) of Armed Forces Act 1972 – Long period of absence without leave – Whether offence of desertion established – Whether requisite actual presence of intention to remain permanently absent from duty made out – Whether desertion could be inferred from continuous* E *period of absence without authorisation – Whether charge made out – Whether decision sustainable*

JURISDICTION: *Courts – Powers and jurisdiction – Matters relating to decision of court-martial – Whether court could intervene in decisions of military courts or military laws – Whether complaint concerned compliance of procedure or substance* F *of charge – Whether matters relating substantive law within purview of courts – Whether within court's jurisdiction and duty to intervene*

The appellant, medically trained, commenced service in the armed forces and was later promoted as a Colonel. The appellant was posted as an G anaesthetist at Hospital Tentera Tuanku Mizan, Kuala Lumpur. From 19 October 2016 to 4 May 2017, the appellant was absent from work without leave. On 4 May 2017, he was arrested by the military police, and was produced before the Magistrate's Court on 8 May 2017. He was, however, released because the arrest was contrary to the procedure in s. 174(4) of the Armed Forces Act 1972 ('Act'). Later, on the same day, the appellant H reported for work at his old station, Hospital Tentera Tuanku Mizan. He was, however, placed in 'Jabatan Am'. Three months later, the appellant was court-martialled and found guilty of the offence of desertion under s. 54(1)(a) of the Act by the respondent. He was sentenced to three months imprisonment and dishonourable discharge from His Majesty's service. The I appellant challenged the respondent's decision by way of judicial review proceedings. He was unsuccessful at both the High Court and the Court of

Appeal. Hence, the appellant obtained leave to appeal to the Federal Court. The complaint of the appellant was that the sole charge against him under s. 54(1)(a) was defective, legally erroneous and could not be sustained in law and on the facts.

Held (allowing appeal with costs)
Per Mary Lim FCJ delivering the judgment of the court:

(1) While the courts generally refrain from examining merits of proceedings in *quasi*-judicial or disciplinary tribunals, there are exceptional circumstances and reasons why intervention is nevertheless warranted and justified. The complaint in this appeal did not concern compliance or non-compliance of procedure; it was a complaint on the substance of the charge itself, that it was defective, erroneous and illegal. It was a matter of law, entirely within the purview of this court, more so when the fundamental rights of the appellant as military personnel were alleged to have been infringed or imperilled; rights such as his right to livelihood as enshrined in art. 5 of the Federal Constitution. As the question turned on a matter of substantive law, especially of criminal justice, the courts have every jurisdiction and duty to intervene; not restricted to reviewing complaints of procedural non-compliance. (paras 21, 26 & 32)

(2) While the fact of not being present at work or duty was not in dispute, the existence of the requisite intention was very much in dispute. The duty was upon the prosecution to prove and for the respondent to properly and legally find that the appellant left His Majesty's service with that requisite intention. It was not for the appellant to prove that he had the intention to remain or even an intention not to be permanently absent from duty. The prosecution never established the actual presence of the intention to remain permanently absent from duty, an element which is absolutely vital and critical to the charge of desertion under s. 54(1)(a) with desertion as defined in s. 54(2). It chose instead to invite the respondent to infer that the intention to desert was evidenced by the continuous period of absence, suggesting that, but for his arrest, the appellant would never have returned to duty. The period of continuous absence without proper authorisation, whether for six months or any other period, without more, was insufficient to establish the offence of desertion. Clearly, that requisite intention was not established. (paras 33, 37 & 41)

(3) The respondent had also erroneously relied on the decision of *R v. Mahoney* as authority for the proposition that the court-martial was justified in drawing an inference that an accused did not intend to return to duty by the 'ample time' during which an accused is absent from his unit; that the fact there was a long period of absence, the reasonable

A inference was that the appellant intended to permanently remain absent from duty. It was further unclear if the inference drawn was the presence of an intention to desert that subsisted at the time of leaving or was only formed subsequently. In a charge as serious as desertion, which carries not only a punishment of a period of imprisonment but a dishonourable
B discharge from His Majesty's service, there should be clear and precise findings and not a matter of guesswork. The charge against the appellant under s. 54(1)(a) read with s. 54(2)(a) had clearly not been made out. On the face of the record, the decision of the respondent did not accord with the terms prescribing the offence of desertion under s. 54(1)(a) and (2)(a).
C Such a decision was evidently unsustainable in law and must be quashed. (paras 42-44)

Bahasa Melayu *Headnotes*

Perayu, yang terlatih dalam bidang perubatan, memulakan perkhidmatan dengan tentera darat dan kemudian dinaikkan pangkat sebagai Kolonel.
D Perayu ditempatkan sebagai pakar bius di Hospital Tentera Tuanku Mizan, Kuala Lumpur. Dari 19 Oktober 2016 hingga 4 Mei 2017, perayu tidak hadir ke tempat kerja tanpa kebenaran. Pada 4 Mei 2017, beliau ditangkap oleh polis tentera, dan dikemukakan ke Mahkamah Majistret pada 8 Mei 2017. Walau bagaimanapun, beliau dilepaskan kerana penangkapan beliau
E bertentangan dengan prosedur dalam s. 174(4) Akta Angkatan Tentera 1972 ('Akta'). Kemudian, pada hari yang sama, perayu melaporkan diri untuk bekerja di tempat bertugas lama beliau, Hospital Tentera Tuanku Mizan. Beliau, walau bagaimanapun, ditempatkan di Jabatan Am. Tiga bulan kemudian, perayu dibicarakan di mahkamah tentera dan didapati bersalah
F oleh responden atas kesalahan meninggalkan tugas bawah s. 54(1)(a) Akta. Dia dijatuhkan hukuman tiga bulan penjara dan dibuang kerja dengan keji daripada perkhidmatan Seri Paduka Baginda. Perayu mencabar keputusan responden melalui prosiding semakan kehakiman. Beliau tidak berjaya di Mahkamah Tinggi dan di Mahkamah Rayuan. Oleh itu, perayu memperoleh
G kebenaran merayu ke Mahkamah Persekutuan. Aduan perayu adalah pertuduhan tunggal terhadap beliau bawah s. 54(1)(a) adalah cacat, salah di sisi undang-undang dan tidak boleh dipertahankan dari segi undang-undang dan fakta.

Diputuskan (membenarkan rayuan dengan kos)
H **Oleh Mary Lim HMP menyampaikan penghakiman mahkamah:**

(1) Walaupun mahkamah, secara amnya, menahan diri daripada menilai merit prosiding dalam tribunal separa kehakiman atau disiplin, terdapat hal keadaan dan alasan-alasan khas mengapa campur tangan adalah wajar dan mempunyai justifikasi. Aduan dalam rayuan ini bukan tentang
I pematuhan atau ketidakpatuhan prosedur; ini adalah aduan tentang inti pati pertuduhan itu sendiri, bahawa itu adalah cacat, salah dan satu

kepenyalahan undang-undang. Ini berkait dengan perkara undang-undang, sama sekali dalam bidang kuasa mahkamah ini, lebih-lebih lagi apabila hak asasi perayu sebagai pegawai tentera dikatakan dilanggar atau dibahayakan; hak seperti hak untuk hidup seperti yang termaktub dalam per. 5 Perlembagaan Persekutuan. Oleh sebab soalan tersebut berkisar tentang undang-undang substantif, khususnya dalam keadilan jenayah, mahkamah-mahkamah mempunyai bidang kuasa dan kewajipan untuk campur tangan; tidak terhad pada semakan aduan ketidakpatuhan prosedur.

(2) Walaupun fakta bahawa tidak hadir bekerja atau bertugas tidak dipertikaikan, kewujudan niat yang perlu adalah amat dipertikaikan. Menjadi tanggungjawab pihak pendakwaan untuk membuktikan dan responden untuk membuat dapatan wajar dan sah bahawa perayu meninggalkan perkhidmatan Seri Paduka Baginda dengan niat yang diperlukan untuk itu. Bukan tanggungjawab perayu untuk membuktikan bahawa beliau mempunyai niat untuk kekal ataupun ketiadaan niat untuk tidak hadir bertugas secara kekal. Pihak pendakwaan tidak membuktikan adanya niat untuk tidak hadir bertugas secara kekal, salah satu elemen yang amat penting dan kritikal dalam pertuduhan tinggal tugas bawah s. 54(1)(a), tinggal tugas seperti yang didefinisikan dalam s. 54(2). Sebaliknya, ia memilih untuk meminta responden membuat anggapan bahawa niat untuk meninggalkan tugas dibuktikan melalui ketidakhadiran untuk tempoh berterusan, mencadangkan bahawa, jika bukan kerana penangkapan beliau, perayu tidak mungkin kembali bertugas. Tempoh berterusan ketidakhadiran tanpa kebenaran tidak sewajarnya, sama ada selama enam bulan atau apa-apa tempoh lain, mencukupi untuk membuktikan kesalahan tinggal tugas. Niat yang diperlukan jelas tidak dibuktikan.

(3) Responden juga secara salah bersandar atas keputusan *R v. Mahoney* sebagai autoriti untuk kenyataan bahawa mahkamah tentera bertindak wajar apabila membuat inferens seorang tertuduh tidak berniat untuk kembali bertugas berdasarkan pada 'tempoh lama' tertuduh tidak hadir bertugas ke unitnya; bahawa atas fakta tempoh ketidakhadiran yang lama, inferens munasabah adalah bahawa perayu berniat untuk tidak hadir bertugas secara kekal. Selanjutnya, tidak jelas sama ada inferens yang dibuat adalah tentang kehadiran niat meninggalkan kerja telah ada pada masa meninggalkan kerja atau hanya terbentuk kemudiannya. Dalam pertuduhan yang serius seperti meninggalkan kerja, yang membawa bukan hanya hukuman satu tempoh pemenjaraan, malahan pembuangan dengan keji daripada perkhidmatan Seri Paduka Baginda, perlu ada dapatan jelas dan bukan agakan semata-mata. Pertuduhan terhadap perayu bawah s. 54(1)(a) dibaca bersama-sama dengan s.

54(2)(a) jelas tidak dibuktikan. Atas rekod, keputusan responden tidak selari dengan terma yang memperuntukkan kesalahan tinggal kerja bawah s. 54(1)(a) dan (2)(a). Keputusan sedemikian jelas tidak boleh dikekalkan di sisi undang-undang dan mesti dibatalkan.

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Council Of Civil Service Unions v. Minister For The Civil Service [1985] AC 374 ***(refd)***

Gobi Avedian v. PP [2020] SGCA 102 ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin, Yang Dipertua Mahkamah Tentera Pulau Pinang & Anor [1997] 2 CLJ 752 CA ***(refd)***

Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***

Muhammad Nabill Mohd Fuad v. PP [2020] SGCA 25 ***(refd)***

Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***

Peter Chong Ngen Onn & Ors v. Colonel Adam Abubakar & Ors [1976] 1 LNS 93 FC ***(refd)***

PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***

R v. Mahoney [1956] 3 All ER 799 ***(not foll)***

R v. Secretary Of State For War, Ex parte Martyn [1949] 1 All ER 242 ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ramalingam Ravinthran v. Attorney General [2012] 2 SLR 49 ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339 FC ***(refd)***

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***

The King v. The Army Council, Ex parte Ravenscroft [1917] 2 KB 504 ***(refd)***

Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(refd)***

Legislation referred to:

Armed Forces Act 1972, ss. 54(1)(a), (2)(a), (b), 55, 98, 125, 128, 174(4)
Federal Constitution, arts. 5, 145(3)

For the appellant - Cecil Wilbert, Mohanaraj Abaraham, Muhammed Nasser Yusuf, Rishwant Singh Amarjeet Singh, Mugunthan Vadiveloo, Rejinder Singh Gurdev Singh & Koh Wei Xian; M/s The Law Chambers of Fauzi & Nasser

For the respondents - Ahmad Hanir Hambaly & Noor Atiqah Zainal Abidin; SFCs

[Editor's note: For the Court of Appeal judgment, please see Kolonel Dr Faiz Azraai Abdul Aziz lwn. Mahkamah Tentera Divisyen Keempat Infantri Malaysia [2022] 7 CLJ 192 (overruled); For the High Court judgment, please see [2019] 1 LNS 1586 (overruled).]

Reported by S Barathi

JUDGMENT

Mary Lim FCJ:

[1] There is a world of difference between being absent without leave (AWOL) from your station or post, and being a deserter. In the armed forces, whether navy, army or air, it is a question of honour.

[2] In this appeal, the appellant was court-martialled and found guilty for the offence of desertion under s. 54(1)(a) of the Armed Forces Act 1972 (Act 77) by the respondent. He was sentenced to three months imprisonment and dishonourable discharge from His Majesty's service. The appellant challenged the respondent's decision by way of judicial review proceedings. He was unsuccessful at both the High Court and the Court of Appeal.

[3] On 14 February 2022, the Federal Court granted leave on three questions of law.

[4] On 20 September 2022, we unanimously allowed his appeal; answering the third question posed, in the negative. That answer was sufficient reason for us to allow the appeal in which case the remaining two questions need not be answered. The three questions of law which generally revolve around the interpretation of ss. 54(1)(a) and 54(2)(a) of Act 77 are:

(i) bolehkah seorang tentera yang telah kembali melapor diri dan bertugas secara aktif selepas satu tempoh cuti yang tidak dibenarkan dituduh atas kesalahan tinggal tugas mengikut s. 54(1)(a) Akta Angkatan Tentera 1972 [Akta 77]?

[Can a soldier who has returned to active service after a period of unsanctioned leave be subsequently charged for desertion within the meaning of s. 54(1)(a) of the Armed Forces Act 1972 [Act 77]?]

(ii) bolehkah seorang tentera yang kembali melapor diri dan bertugas semula selepas satu tempoh cuti yang tidak dibenarkan dikatakan mempunyai niat untuk meninggalkan tugas buat selama-lamanya sepertimana yang diperuntukkan mengikut s. 54(2)(a) Akta Angkatan Tentera 1972 [Akta 77]?

[Can a soldier who rejoined active service after a period of unsanctioned leave intend to be remained permanently (*sic*) absent from his duty as provided under s. 54(2)(a) of the Armed Forces Act 1972 [Act 77]?]

(iii) bolehkah perbuatan tidak hadir tanpa cuti selama enam bulan dikatakan telah cukup memenuhi kehendak elemen "meninggalkan atau tidak masuk atau tidak masuk semula dalam Perkhidmatan Seri Paduka Seri Baginda ataupun yang terbentuk kemudiannya, hendak meninggalkan kewajipan buat selama-lamanya" seperti yang diperuntukkan mengikut s. 54(2)(a) Akta Angkatan Tentera 1972 [Akta 77]?

A [Can an unsanctioned absence from duty for six months be sufficient to satisfy the element of leave His Majesty's Service if fails (*sic*) to rejoin His Majesty's service, with the intention of remaining permanently absent from this duty as stipulated under s. 54(2)(a) of the Armed Forces Act 1972 [Act 77]?]

B **Background**

[5] The appellant, medically trained, commenced service in the armed forces on 2 April 2002. On 21 April 2015, he was promoted as a Colonel. At the material time, the appellant was posted as an anaesthetist at Hospital Tentera Tuanku Mizan, Kuala Lumpur.

C

[6] From 19 October 2016 to 4 May 2017, the appellant was absent from work without leave. On 4 May 2017, he was arrested by the military police at a car park in Section 13, Shah Alam, Selangor. He was produced before the Magistrate's Court on 8 May 2017. He was, however, released because the arrest was contrary to the procedure in s. 174(4) of Act 77.

D

[7] Later that same day, at or about 3.30pm, the appellant put on his uniform and reported for work at his old station, Hospital Tentera Tuanku Mizan, Kuala Lumpur. He was, however, placed in "Jabatan Am".

[8] Three months later, on 4 August 2017, he was charged with the E offence of desertion under s. 54(1)(a) of Act 77 and the charge reads as follows:

> **Pertuduhan**
>
> **Kol (Dr) Faiz Azraai bin Abdul Aziz (3009928)** Markas 11 Briged, Kem
> F Sungai Buloh, Selangor, seorang pegawai angkatan tetap yang tertakluk kepada Undang-Undang Perkhidmatan dibawah Seksyen 209(1)(a) Akta Angkatan Tentera 1972 adakah diperuntukan atas:
>
> **Tinggal Tugas Yang Bertentangan Dengan Seksyen 54(1)(a) Akta Angkatan Tentera 1972**
>
> G Iaitu ia, di Hospital Tentera Tuanku Mizan, Kuala Lumpur, No. 3 Jalan 4/27A, Seksyen 2 Wangsa Maju, 53300 Kuala Lumpur **telah meninggalkan perkhidmatan Seri Paduka Baginda** mulai 19 Oktober 2016 jam lebih kurang 0930 hingga 04 Mei 2017 jam lebih kurang 1330 **dengan niat** pada masa meninggalkan atau ada niat kemudiannya **untuk tetap tidak hadir bertugas selama-lamanya.** (emphasis added)

H

[9] Amongst the defences raised by the appellant was that he was suffering from depression caused by stress both at the workplace and at home; that he was on medication which had the side effect of him losing focus on his work. His applications for leave were also rejected.

I

[10] On 28 August 2017, the military court, the respondent, found the appellant guilty as charged and sentenced him to three months imprisonment and he was also dishonourably discharged from service (the impugned decision). The impugned decision was subsequently confirmed by the appellant's confirming officer on 18 October 2018 – see s. 125 of Act 77.

[11] The appellant exercised his right of review under s. 128 of Act 77 but was unsuccessful. He then initiated judicial review proceedings seeking to quash the impugned decision on the grounds of defective and legally erroneous charge, that the proper charge was one under s. 55 of Act 77; that the respondent had exceeded its jurisdiction when it did not have regard to the fact that the prosecution had failed to prove desertion under s. 54(2)(a) or (b) under Act 77; and to have regard to relevant matters. Although he succeeded in obtaining leave, the appellant failed on the merits.

Decisions Of The High Court And The Court Of Appeal

[12] The High Court disagreed with the appellant, finding as follows:

(i) the authorities had the discretion under s. 98 of Act 77 to decide on the appropriate charge, whether for desertion or for AWOL;

(ii) the charge for desertion was proved because the appellant was indeed absent without leave;

(iii) because the period of absence was substantial, it was correct for the respondent to conclude that there was evidence of desertion;

(iv) the conviction was not erroneous since there was no evidence of intention on the part of the appellant to return or resume duty/service.

[13] The learned judge added that it was reasonable to infer that the appellant had every intention to desert "berniat untuk meninggalkan perkhidmatan buat selama-lamanya" because if the appellant had not been arrested, he would not have returned to work.

[14] The learned judge further held that the presence of the word "or" in s. 54(2)(a), meant that the offence of desertion is proved once the prosecution has shown that the appellant had left the service. The element of "remaining permanently absent from his duty" is satisfied once it has been proved that the person or officer has left the service. More importantly, the learned judge held that there was no requirement to prove intention to remain permanently absent from duty, suggesting that this element was only required where the charge was for leaving the service and not re-joining the service.

[15] The Court of Appeal agreed with the High Court on all fronts. In para. [26], the decision of *R v. Mahoney* [1956] 3 All ER 799 was cited in support, both factually and for the legal principles propounded, and then applied to the particular facts in the appeal.

[16] The Court of Appeal found that from the evidence adduced in the records of appeal, there was no error on the part of the respondent when it ruled that a *prima facie* case had been established and the appellant was required to enter his defence to the charge under s. 54(1)(a). Further, the respondent was entitled to infer from the absence of six months and 25 days without leave that the appellant had no intention to return to work.

[17] The respondent's decision was also said to "tidak dicemari dengan kekhilafan undang-undang, tidak rasional atau berlakunya ketidakpatuhan prosedur"; that "Dapatan responden yang mendapati perayu gagal menunjukkan niat untuk kembali bertugas setelah mendengar keterangan pembelaan perayu adalah dapatan fakta yang biasanya tidak akan diusik di peringkat semakan kehakiman". Citing this court's decision in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149, the Court of Appeal reasoned that the courts have "limited powers over administrative determinations of public bodies and are constrained to confirm the findings of disciplinary hearings"; that the courts "cannot introduce technicalities of a court of law to the disciplinary authority" as "the courts do not normally regard it as their function to interfere with the findings of fact by the disciplinary authority".

[18] The appellant's other complaints were also rejected by the Court of Appeal.

Our Analysis And Determination

[19] We have no argument on the underlying principles engaged when the court is approached for the exercise of its supervisory jurisdiction that the court does not sit on appeal. The well-settled principles apply regardless the underlying subject matter emanates from civil service conditions or from the military, navy or air force. But, it is one thing to cite these principles and quite another to recognise, appreciate and apply these principles in any given circumstances. Otherwise, these principles will only be cold piety to their true loftiness and meaning.

[20] In this appeal, the real question is in the third question of law for which leave was granted:

> Bolehkah perbuatan tidak hadir tanpa cuti selama enam bulan dikatakan telah cukup memenuhi kehendak elemen "meninggalkan atau tidak masuk atau tidak masuk semula dalam Perkhidmatan Seri Paduka Seri Baginda ataupun yang terbentuk kemudiannya, hendak meninggalkan kewajipan buat selama-lamanya" seperti yang diperuntukkan mengikut s. 54(2)(a) Akta Angkatan Tentera 1972 [Akta 77]?
>
> Can an unsanctioned absence from duty for six months be sufficient to satisfy the element of leave His Majesty's service if fails (*sic*) to rejoin His Majesty's service, with the intention of remaining permanently absent from this duty as stipulated under s. 54(2)(a) of the Armed Forces Act 1972 [Act 77]?

[21] The complaint of the appellant is that the sole charge against him under s. 54(1)(a) is defective, legally erroneous and cannot be sustained in law and on the facts. While the courts generally refrain from examining merits of proceedings in *quasi*-judicial or disciplinary tribunals, there are exceptional circumstances and reasons why intervention is nevertheless warranted and justified. Our jurisprudence is replete with relevant case law – see for instance *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1; *Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541; [2014] 4 MLJ 765; *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563.

[22] In this appeal, the exercise of examining a charge under the relevant law is far from being an intrusion into domestic inquiries and sitting as if on appeal. It is a question of law, very much within the ambit and allegations of illegality envisaged under the *Wednesbury* principles enunciated in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 and further developed in the *locus classicus* of *Council Of Civil Service Unions v. Minister For The Civil Service* [1985] AC 374. These principles have been applied in our courts for a long, long while now – see for instance, *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561; and more recently in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209; *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 CLJ 339; [2022] 2 MLJ 356; and where a more robust approach has since been adopted by our courts.

[23] In *Sundra Rajoo Nadarajah*, though made in the context of the powers of the Attorney General under art. 145 of the Federal Constitution, that "while the AG/PP's powers are reviewable, the AG/PP's discretion under art. 145(3) of the FC, as a matter of policy, remains subject to a higher threshold of scrutiny (see Chan Sek Keong CJ in *Ramalingam Ravinthran v. Attorney General* [2012] 2 SLR 49), the following is no less a timely reminder about the role, function and powers of the courts, which we do not see watered down simply because we are faced with matters of military discipline:

> [97] Deference does not however translate to complete surrender. Ours is a system built on constitutional supremacy where accountability, separation of powers and Rule of Law take centre stage. Much headway has been made in our constitutional jurisprudence to curate the fine balance between policy considerations on the one side, and the adjudication and supervision of the legality of State action by the judicial branch – on the other. This gradual shift from unfettered discretion to restricted supervision is apparent from the judgment of this Court in

A *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) & Another Appeal* [2019] 4 CLJ 561 [2019] 3 MLJ 443.

[24] In the context of judicial review of decisions arising from military discipline, a careful read of the decision in *Peter Chong Ngen Onn & Ors*
B *v. Colonel Adam Abubakar & Ors* [1976] 1 LNS 93; [1977] 2 MLJ 142 illustrates that it was never the position in law that the courts will never intervene in decisions of the military courts or in matters of military law. We fully appreciate that matters of discipline are best or better left to the military itself but that is not the same as saying that the courts have no jurisdiction
C in these matters. The authors of *Military Legal Proceedings In Malaysia, Teo Say Eng & Colonel Wan Normazlan bin Che Jaafar* (Lexis Nexis) explained the unique features of military discipline and why a higher degree of discipline is required in the armed forces:

> ..., the armed forces also have laws and regulations with their own system
D of administration which is known as the military legal system. It is a unique legal system which is created to enforce certain standards of behaviour and to maintain discipline in the armed forces. Discipline is the soul of the armed forces. It is the basis of all military efficiency. The military system establishes a separate system of military justice for members of the armed forces as distinct from criminal justice for the
E civilians. There are three main reasons for the existence of such separate system of military justice: one reason is that the need for swift and summary machinery for the maintenance of discipline; secondly, the adjudication of military crimes may require military expertise by the court and therefore the system requires that military offences should be tried by military personnel; thirdly, the armed forces which are stationed
F abroad, outside the jurisdiction of their country's civil courts are still subject to the jurisdiction of courts-martial.

[25] That need for higher discipline is understandable and makes logical sense. In fact, in *Peter Chong*, the Federal Court cited with approval a view of the Divisional Court in *The King v. The Army Council, Ex parte Ravenscroft*
G [1917] 2 KB 504; a case where the complaint was of non-compliance of regulations made under the Army Act in the United Kingdom dealing with service of notices of inquiry to which Viscount Reading CJ opined that "... this is a military matter. The (applicant) was under military law ...". It was in that respect that the view on non-interference was expressed. The Federal
H Court then went on to cite Lord Goddard CJ in *R v. Secretary Of State For War, Ex parte Martyn* [1949] 1 All ER 242, for the proposition that "the court could only interfere with military courts and matters of military law insofar as the civil rights of a soldier may be affected ...".

[26] The complaint in this appeal does not concern compliance or non-
I compliance of procedure; it is a complaint on the substance of the charge itself, that it is defective, erroneous and illegal. That is a matter of law,

entirely within the purview of this court, more so when the fundamental rights of the appellant as military personnel are alleged to have been infringed or imperilled; rights such as his right to livelihood as enshrined in art. 5 of the Federal Constitution.

[27] Turning then to the charge. It is for an offence of desertion under s. 54(1)(a) when, if at all, it ought to have been a charge of absence without leave under s. 55. Both sections read as follows:

Section 54. Desertion

(1) Every person subject to service law under this Act who-

(a) deserts; or

(b) persuades, endeavours to persuade, procures or attempts to procure any person subject to service law under this Act to desert,

shall, on conviction by court-martial, be liable to imprisonment or any less punishment provided by this Act:

Provided that a person shall not be liable to be imprisoned for more than two years unless:

(i) if the offence was against paragraph (a), he was on active service or under orders for active service at the time when it was committed; or

(ii) if the offence was against paragraph (b), the person in relation to whom it was committed was on active service or under orders for active service at that time.

(2) For the purpose of this Act a person deserts who:

(a) leaves His Majesty's Service, or when it is his duty to do so, fails to join or rejoin His Majesty's Service, with (in either case) the intention, either subsisting at the time of the leaving or failure or formed thereafter, of remaining permanently absent from his duty;

(b) absents himself without leave with intent to avoid serving at any place overseas or to avoid service or any particular service when before the enemy;

(c) in the case of sailor having been warned that his vessel is under sailing orders, is absent without proper authority, with intention of missing that vessel; or

(d) being an officer enlists in or enters any of the armed forces without having been relieved of his commission, or being a serviceman enlists in or enters any of the armed forces without having been discharged from his previous enlistment,

and references in this Act to desertion shall be construed accordingly.

A (3) In addition to or *in lieu* of any punishment provided by subsection (1), the court-martial by whom a serviceman is convicted of desertion may direct that the whole or any part of his service previous to the period as respects which he is convicted of having been a deserter shall be forfeited. (emphasis added)

B **Section 55. Absence without leave**

Every person subject to service law under this Act who:

(a) absents himself without leave; or

(b) persuades, endeavours to persuade, procures or attempts to procure any person subject to service law under this Act to absent himself C without leave,

shall, on conviction by court-martial, be liable to imprisonment for term not exceeding two years or any less punishment provided by this Act.

[28] Act 77 defines what "desertion" is in s. 54(2). It envisages different D scenarios when a person who is subject to service law may be said to have deserted His Majesty's service. First is where this person leaves the service with the intention of remaining permanently absent from his duty. Second, is where he fails to join or re-join His Majesty's service when he has a duty to join or re-join His Majesty's service and he does so with the intention of E remaining permanently absent from his duty. This intention may either subsist at the time of leaving or formed later.

[29] It is important to note that the intention relates not only to being absent from duty but a permanence in that absence. In other words, there is intention to stay away from His Majesty's service, permanently; never to F return to the service.

[30] This intention to remain permanently absent from duty is the critical element in the charge of desertion that there is this intention to desert aside from the other element of leaving His Majesty's service, which is quite apart from the intention to be absent. This element is vital to a charge for desertion G and it becomes more apparent when the offence of desertion is contrasted with and distinguished from the offence of absence without leave, typically known by the moniker, "AWOL", under s. 55. The latter offence is not dependent on the establishment of an intention to remain permanently absent from duty. It merely requires the prosecution to prove and the respondent H to find an accused absent from duty and that the absence was without leave. This material difference between the two offences is further reflected in the severity of the punishment that is meted out: in the case of desertion, there may be a forfeiture of service in addition to a term of imprisonment.

[31] It goes without saying that the burden lies with the prosecution or the I respondent to prove all the elements of the charge; in particular that element of intention to remain permanently absent from duty or that intention to

desert. Learned Senior Federal Counsel arguing for the respondent accepts this is the applicable principle of law. However, learned SFC urged this court to refrain from disturbing the decision of the respondent as this court has no jurisdiction to interfere with the respondent's findings of fact and matters of merit.

[32] With respect, we must disagree with learned SFC. As we had said at the outset, this third question turns on a matter of substantive law, especially of criminal justice. In such matters, the courts have every jurisdiction and duty to intervene; not restricted to reviewing complaints of procedural non-compliance.

[33] For the purpose of this appeal, it is evident from the terms of the charge that the appellant is alleged to have committed desertion in the first sense as explained above; that he left His Majesty's service with the intention of remaining permanently absent from his duty; and that intention either subsisted at the time of leaving or was formed subsequently. While the fact of not being present at work or duty is not in dispute, the existence of that requisite intention was very much in dispute. The duty was upon the prosecution to prove and for the respondent to properly and legally find that the appellant left His Majesty's service with that requisite intention. It was not for the appellant to prove that he had the intention to remain or even an intention not to be permanently absent from duty (see *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154; [2008] MLJU 647). It was thus erroneous of the High Court to find that there was no evidence to show that the appellant intended to return to duty before he was arrested by the military police.

[34] The presumption of innocence, a hallmark of criminal justice in a decent democracy is enjoyed by all persons including the appellant who are subject to service law. In matters of criminal justice, the same principles of proving offences apply. See for instance, *Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin, Yang Dipertua Mahkamah Tentera Pulau Pinang & Anor* [1997] 2 CLJ 752 where one of the issues in contention was the meaning of *prima facie* case and the degree of proof required at the end of prosecution case.

[35] As indicated, the period of absence from duty, that is, from 19 October 2016 to 4 May 2017, is not denied. Although the reasons for such absence were offered by the appellant, they are irrelevant for the purpose of this question posed. What however, is also not in dispute is that the appellant reported back to work. That was on 8 May 2017, after his four days of incarceration by the military police when he was produced before the Magistrate's Court. That detention was the subject matter of a separate civil suit and for which the respondent paid the appellant, compensation. After his release in court, the appellant reported for duty at Hospital Tentera Tuanku Mizan, attired in his uniform. He was put in the "pool", "Jabatan Am".

[36] The appellant argued that while it may be said that he had been absent from duty without authorisation, it cannot be suggested that he had the intention to remain permanently absent from his duty. This was reflected by his return to duty, be it on 4 May 2017 when he was arrested by the military police, or voluntarily on 8 May 2017 after his release by the Magistrate's Court; and by the acceptance of his return to duty by the respondent when he was placed in Jabatan Am.

[37] We agree. The prosecution never established the actual presence of this element of intention to remain permanently absent from duty, an element which is absolutely vital and critical to the charge of desertion under s. 54(1)(a) with desertion as defined in s. 54(2). It chose instead to invite the respondent to infer that the intention to desert was evidenced by the continuous period of absence, suggesting that but for his arrest, the appellant would never have returned to duty. The respondent accepted this and found the appellant guilty as charged by inference. We find this highly erroneous.

[38] Bearing in mind that it was for the prosecution team to prove the presence of intention to desert, whether this intention subsisted at the time of leaving or was formed later, it was incumbent upon the prosecution to lead evidence to establish that intention. Since it did not have any direct evidence, it is a rule of essential justice that this critical element of intention to desert must be put to the appellant at the time when he was cross-examined.

[39] The line of authorities evidencing this proposition is frequently cited in relation to the defence case. The principle is equally applicable to the prosecution. See *Muhammad Nabill Mohd Fuad v. PP* [2020] SGCA 25; *Gobi Avedian v. PP* [2020] SGCA 102. In *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561, the Supreme Court held:

> Indeed, it behoves the defence to do so (to put its case at the earliest possible stage) for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticized for keeping his defence 'up his sleeve' so to speak, and it being branded as a recent invention.

[40] Then, there is the seminal decision in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209, where Edgar Joseph Jr FCJ speaking for the Federal Court stated:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention – in other words, "kept up its sleeve", as it were – and revealed for the first time when the accused makes his defence from the witness box or

the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

[41] The period of continuous absence without proper authorisation, whether for six months or any other period, without more, is in our opinion, insufficient to establish the offence of desertion. At best, it is evidence in support of the offence of AWOL. But, that was not the charge against the appellant. The charge was for desertion, that is absence from duty with specific intention as defined in s. 54(2)(a). Clearly, that requisite intention was not established.

[42] The respondent has also erroneously relied on the decision of *R v. Mahoney* [1956] 3 All ER 799 as authority for the proposition that the court-martial is justified in drawing an inference that an accused did not intend to return to duty by the "ample time" during which an accused is absent from his unit; that the fact there was a long period of absence, the reasonable inference is that the appellant intended to permanently remain absent from duty. Since there were no questions asked of the appellant relating to or for the purpose of establishing the intention to desert, the respondent was in no position to draw any inference, let alone a reasonable inference of a positive intention to desert.

[43] It is further unclear if the inference drawn was the presence of an intention to desert that subsisted at the time of leaving or was only formed subsequently. In a charge as serious as desertion which carries not only a punishment of a period of imprisonment but a dishonourable discharge from His Majesty's service, there should be clear precise findings and not a matter of guesswork.

[44] The charge against the appellant under s. 54(1)(a) read with s. 54(2)(a) has clearly not been made out. On the face of the record, we find that the decision of the respondent does not accord with the terms prescribing the offence of desertion under ss. 54(1)(a) and (2)(a). Such a decision is evidently unsustainable in law and must be quashed.

[45] We are therefore constrained to answer the third question of law posed in the negative. This is sufficient to dispose of the appeal and we do not need to answer questions 1 and 2.

Conclusion

[46] With these reasons, we therefore allow the appeal with costs and we set aside the orders of the courts below. We further grant the order of *certiorari* in the terms as sought in prayer (1) in encl. 1 filed at the High Court.